

The Politics of Constitutional Reform in Italy. An assessment of the most recent developments¹

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1. Premise

Purpose of this paper is to offer a short but relatively comprehensive framework to understand the present political and institutional situation in Italy and in particular to evaluate the most recent parliamentary developments which have led to the adoption of a potentially major reform of Part II of the Italian Constitution as introduced by the Berlusconi II Cabinet, approved by the Senate and amended by the Chamber of Deputies². Most of the focus will be devoted to the twelve years following the new electoral laws of 1993 and the so-called Italian transition of the Nineties: in fact many foreign scholars are well acquainted with at least some of the main features of the Italian political and institutional history after World War II and there is no space here to go back to that thoroughly. For what methodology is concerned, I strongly believe that constitutional matters concerning the functioning of the main political institutions cannot be studied only on a formal base: an integrated (historical, political, legal) approach is necessary. Such an approach I have attempted to follow. Finally I will try and submit some remarks in a comparative perspective with special emphasis to Japan and Italy of course. As we were able to discuss in Florence three years ago, many similarities along with several great differences can be traced in the political and institutional histories of these two countries. To sum it up I shall note that both Italy and Japan have gone through a sort of accelerated and sudden modernisation which has left many unsolved issues in both countries. And yet both countries have witnessed a major crisis in their political system in the very same years, both have tried to cope with it recurring to new electoral laws while the outcome (at least unto now) seems relatively different.

¹ This is a revised version of the presentation I had the privilege to give on the occasion of the international *Seminar of Constitutional and Political Studies* organised at the *Institute for Social Science* of the Sensyu University in Tokio on 25 September 2004. I must wholeheartedly thank all my numerous Japanese colleagues, especially those of the hosting Institution, but most of all: Prof. Toshiyasu Takahashi of Hiroshima Shudo University who made my visiting fellowship in Japan possible and helped in introducing the topic of the Seminar, Prof. Shinichiro Murakami of Kobe City University of Foreign Studies who organised the Seminar and also gave a great contribution with his own introduction, Prof. Tadano of Hitotsubashi University and Prof. Mizushima of Chiba University who valuably played the role of discussants. I cannot mention the various other colleagues who honoured me with their presence and with their remarks: in the following text I have tried to take into consideration at least some of them. Finally let me mention the Japanese-Italian Association: a lively and active group of scholars of different disciplines truly dedicated to deepen the reciprocal knowledge of our two countries.

² According to the Italian Constitution any law – and constitutional laws even more so – must be approved in exactly the same text by both Chambers. Until each of them passes an identical text no bill can be considered approved by Parliament, promulgated by the President of the Republic and therefore become law of the land.

2. A short summary of previous key events

There can be little doubt that the Italian political system was bound for a major crisis at least since the beginning of the Eighties. The main strategy based upon the step by step inclusion within the area of the governing coalitions of the parties to the left of the Christian Democrats (Dc) had been brought to its end during the period in which the country had to face the attack of the Red Brigades, culminated in the kidnapping and assassination of Mr Aldo Moro regarded as one of the major Dc leaders (1978). This attack had been faced with the open support of the Communist Party of Italy (Pci) which had been associated to the majority in Parliament, although not included in the executive. This all inclusive way to manage the country proved essential to successfully overcome the terrorist menace, but could not work in the long run. Especially so when at the end of the Seventies the Europeans asked the US to deploy the medium range Cruise missiles in order to face the previous deployment of the SS-20 missiles by the Soviet Union: this central issue made the relations between the center-left parties and the Dc on one side and the Pci on the other very strained. Furthermore it was unlikely that a mature and consolidated democracy could still tolerate the virtual absence of a true opposition and at the same time need very large multi-party coalitions.

To put it shortly, the purely political strategy had hit its ceiling and could not go ahead anymore: both political and institutional changes were needed to run the country and support its development in a more competitive international and European context. In fact a first attempt not to subvert but to incrementally revise the decision making process within the governmental and parliamentary institutions was made at the beginning of the Eighties³. More changes were introduced in order to start applying the majority rule within the legislative process again (previously for over 10 years near unanimity was applied in order to involve the Pci, not admitted within the body of the government, but included in most if not all parliamentary decisions).

The Eighties saw Italy run by a coalition based on no less than five political parties, but basically centered on the strained relation between Dc and the Italian Socialist Party (Psi), strongly opposed by the Pci. On one side the Dc-Psi competition, ferocious although internal to the coalition, fostered a spectacular growth in illegal financing of political activities, on the other side a series of major reforms were passed: I shall just list the new law on Local Government (1990), the first Antitrust legislation (1990), the Act on Government (1988), an entire set of new independent regulatory authorities, new parliamentary regulations including the abolition of the secret vote as an ordinary procedure (a true daily threat to the minimal needed coalition allegiance) (1988). All these novelties however were bound to the strict respect of one of the fundamental laws of Italian post WWII democracy: the rigorously proportional electoral laws applied to the election of all representative bodies (municipal, provincial, regional, state assemblies). This system continued to impose a rather inadequate parliamentarism featured by particularly weak cabinets deprived of the necessary political and juridical support and

³ I refer to the so-called Bozzi Commission, a Committee formed by senators and deputies charged with the task to submit proposals to reform the 1948 Constitution (1983-1985).

therefore unapt to run the sixth or seventh major economic power in the world. The consequent unefficiencies, the growing corruption, the pervasive penetration of greedy political parties in all corners of a more and more dynamic society explain why – contrary to widespread belief, Italy’s transition was already on its way when the famous so-called «clean hands» investigation started and came under public scrutiny (1992). I have always shared the belief that the Italian transition was not prompted by a more or less politically oriented judiciary but by the new challenges that Italy’s ruling class was facing at the end of the 1980s and mostly by its demonstrated inadequacy in dealing effectively with them⁴. I assume that the growing consensus raised in large parts of the North by the populist Northern League led by Mr Bossi should also be regarded as a major side effect of the failures of the traditional party system and of course also as a major force of change (whether for the worse or the best, this is a different matter)⁵.

The major phases of the transition are well known and I will not describe them again here. Let me just remind (a) the arrogant Mafia attacks of 1992-1993; (b) the spectacular financial crisis and the severe last devaluation of the Italian currency (1992); (c) the indictment of nearly one fourth of the members of the two Chambers by the public prosecutors (many sentenced and even more acquitted later on); (d) the resort to direct democracy instruments (referendums) by a mix of a powerful grass-roots movement supported by many opinion leaders and financial circles (tempted by the chance to get rid of such an incompetent political ruling class), and parts of the opposition; (e) the following changes in the local, state and finally regional electoral laws commonly based upon the application of powerful doses of majoritarianism in the selection of both governments and representative assemblies (1993-1995); (f) the major changes in the party system with the disappearance of most of the traditional parties which had run Italy for the previous 50 years (Dc, Psi and the small Socialdemocrats, Republicans and Liberals⁶)...; the transformation of others (mainly the Pci which became Pds and then Ds: “left democrats”, and the “Movimento sociale – destra nazionale”, the traditional heirs of the Fascist party which became An, “national alliance”), and the birth of new parties (“Communist Refoundation”, on the extreme left; a set of heirs of the Christian Democrats and its allies like Udc and Margherita; and of course the brand new party started from scratch by the media tycoon Mr Silvio Berlusconi named “Forza Italia”, “Italy go” as the national sport teams fans always used to shout in the stadiums); and finally (g) the tense and truly transitional XIIth legislative term (1994-1996) following the first application of the new Parliamentary Electoral Laws and the challenged and provisional success of Berlusconi’s first center-right coalition (substituted by Mr Dini’s caretaker cabinet strongly supported by the Mr Scalfaro, the President of the Republic from 1992 to 1999).

⁴ Let me quote an article in English where I attempted to demonstrate this assumption: FUSARO C., *The Politics of Constitutional Reform in Italy: A Framework for Analysis*, “South European Society and Politics”, vo. 3, no. 2 (Autumn 1998), pp. 45-74.

⁵⁵ Note that in the 1992 parliamentary elections, still ruled by the old proportional law, the Northern League was able to raise its senators from 1 (one) to 25, and its deputies from 1 (one) to 55: in total from 2 (two) to 80 (eighty) MPs! The foreign reader can understand what I mean when I assume that «clean hands» which was revealed *after* the 1992 elections, didn’t prompt the Italian transition but seconded it (and brought it to its extreme consequences, of course).

⁶ All these parties (but the Dc as such) still exist legally, but they are reduced to minimal and nearly irrelevant size: some are presently trying to fling themselves again, but the outcome is worse than uncertain.

3. Mixed fortune and achievements of the Center-Left coalition during the Thirteenth Parliament (1996-2001)

In the Spring of 1996 the electoral laws of 1993 were applied for the second time with a clearer although still not entirely satisfying outcome: in fact there was little doubt that the center-left coalition (the “Ulivo”) led by Mr Prodi (a former Christian Democrat and CEO of major publicly owned enterprises) had beaten the center-right coalition led for the second time by Mr Berlusconi. However the left had to pay its toll to the insane Italian bicameral system which requires a double confidence relationship between the government and *both* the Chamber of deputies (the lower House) and the Senate (the upper House). To say it differently: in Italy the government must command a majority in each and both of the two Houses, and this was not the case in 1996 for Mr Prodi who had to rely upon the extreme left parliamentary group of “Rifondazione comunista” without whose support it would have lacked the majority in the lower Chamber. This instance made running the coalition very difficult, and in the end it forced the center-left to no less than two changes in leadership during the same parliamentary term (from Prodi to D’Alema in 1998 and from D’Alema to Amato in 2000⁷).

Mr Prodi’s cabinet’s major accomplishment was enabling Italy to overcome its financial problems triumphantly entering in the exclusive Euro club, the monetary enhanced cooperation among 11 of the UE member States. From the constitutional stand point the Thirteenth Parliament saw important events and novelties, based upon a sort of double track strategy of reform by law and by constitutional revision.

On the side of ordinary legislation, the Prodi government successfully attempted to “trim the grass under the Northern League’s feet” (as we say in Italy) by giving the way to a major devolution of administrative powers to both the Regions and the cities: several coordinated laws and regulations were passed in order to ensure that most public activities would not be performed by the center anymore⁸. However, from a legal point of view this process lacked constitutional backing: any new law passed by Parliament could have reversed the trend.

On the side of constitutional revision a major attempt was launched by both the governing majority and the opposition: the idea was to put an end to the Italian transitional phase by revising part II (and only part II) of the *Italian Constitution* on a bi-partisan base⁹. The political deal beneath this attempt was the reciprocal interest of both the former communists and the new political right to acquire the legitimation which both were in a different measure and way lacking. Furthermore, the center-left expected to consolidate the process of devolution already under way, to renew the political institutions of the country as badly needed and in general to be able to boast a major, possibly even historical,

⁷ The term initiated in 1996 and ended regularly (for the first time since 1968) in 2001.

⁸ These are known in Italy as “the Bassanini Laws” by the name of the member of the Prodi Cabinet who initiated the project.

⁹ Only part II because part I of the Italian Constitution includes values, principles and fundamental rights which none of the two sides entirely trusts the other in case of change. Part II disciplines the various institutional arrangements which are supposedly instrumental to the protection of those values, principles and rights (Parliament, Presidency, Government, Courts, State-Regions relations).

achievement. The center-right hoped to strengthen the governmental institutions as they had always proposed and at the same time to put a clear end to the assumed invasions by the magistrates in some of the most delicate political issues. This second aim was partially shared by the center-left leadership: however it also raised widespread suspicions and the vehement opposition by the large majority of its supporters, backed by no less than the President of the Republic Scalfaro, who feared risks for the independence of the judiciary¹⁰. After over a year of bi-partisan efforts the project submitted by the Third Committee on Constitutional revision led by the leader of the Ds party Massimo D'Alema and summoned in 1997 was dumped by initiative of Mr Berlusconi for reasons which have never been entirely understood (June 1998): most likely because the foreseen deal had proven impossible to maintain¹¹.

However the D'Alema Committee still proved to be able to deliver some useful by-products: in fact some of its proposals in limited areas met the destiny to be recovered, slightly (mostly just *very slightly*) changed to be submitted again to the Chambers as a set of separated acts. No less than four constitutional amendments were therefore passed before the end of the 1996-2001 parliamentary term. The list and a short explanation follows:

- a) *Constitutional Law* 1/1999 was passed in order to revise the form of government and the basic Regional institutions; the direct election of the regional heads of governments was provisionally introduced (in order to be implemented already in view of the regional elections expected in the year 2000) and the regional assemblies' power to pass the Regional Fundamental Charter was effectively strengthened¹²;
- b) *Constitutional Law* 2/1999 was passed in order to revise art. 111 of the Constitution in a way which would grant the so-called *free trial* (that is to say equal opportunities within the process for both prosecutors and defence); the text was in part a translation of the appropriate article of the widely respected European Convention for the Protection of Fundamental Rights;
- c) *Constitutional Laws* 1/2000 and 1/2001 were passed in order to allow absentee ballots to be casted by mail and in order to set aside a handful of MPs to be elected by Italian citizens residing and voting abroad;

¹⁰ This is a particularly delicate issue in Italy where after WWII the public prosecutors (not only the judges) have been recognized by the law (and according to many by the Constitution as well) a thorough independence, unknown to most other countries (where the judiciary is independent but governmental authorities or Parliament may direct the anti-crime action of the prosecutors: which is not the case in Italy). Of course many believe that «clean hands» might have proved impossible if the prosecutors would have had to follow political directions.

¹¹ The 1997-1998 D'Alema Committee is regarded as the *third* because after the 1983-1985 attempt by the so-called Bozzi Committee, a second one had followed in 1992-1994 (the De Mita-Iotti Committee), also with no outcome. In all instances these Committee were named after the names of the politicians who chaired them.

¹² The fundamental law establishing the regional institutions is not called "constitution" within the Italian juridical order because it is assumed that Italy has only *one* Constitution (the "Costituzione della Repubblica"); they are called "statuti", a word – however – which cannot be employed as such in English; this explains why I adopted the term "Fundamental Charter" which seems more appropriate to me.

- d) *Constitutional Law 3/2001* was passed in order to revise the entire title V of the *Italian Constitution* that is to say the 19 articles which establish regional and local authorities, grant their autonomy and determine the State-Regions relationships: the needed and foreseen backing meant to protect the process of devolution started thanks to the Bassanini laws in the years 1997 and 1998¹³.

All the listed constitutional amendments were passed by a bi-partisan majority with the sole exception of the last of the four: to be true its content had been also widely shared (it was nearly all part of the D'Alema Committee's proposal on the matter), but the opposition forces quite openly did not want the center-left coalition to reach such a major success few weeks before the general elections of the Spring of 2001; they asked the majority to postpone the vote after the elections, the majority refused and managed to pass the reform with the strictest majority ever on such matters (a margin of four votes only in the Chamber of Deputies: something unusual and unknown to the Italian constitutional and political practice). This behaviour was bound to set an historic precedent bound to be reminded daily by the center-right coalition within the frame of its definitely not bipartisan efforts to change the *Constitution* during the following Fourteenth Parliament (2001-2006). On the other side, when a referendum was called to ask the people to say its final word on the constitutional revision we have been talking about, the center-right coalition led by Mr Berlusconi, who had just won the 2001 elections with the largest majority in Italian political history, although maintaining some criticism did nothing to oppose the victory of the "yes" option.

4. The Center-Right coalition between the need to implement the Center-Left constitutional legacy, the temptation to start all over again and its internal conflicting strategies

As I have already reported, things turned out in such a way that the winning center-right coalition had to inherit a significant constitutional legacy left by its opponents with special reference to the reform of title V of the *Italian Constitution*: a particularly sensitive matter because of the role of the Northern League within Mr Berlusconi's coalition. It is true that the Northern League had just proven incapable of passing the 4% threshold in order to share the 155 seats allotted thanks to the proportional part of the Chamber's electoral law of 1993: an outcome bound to severely diminish this party's strength within the majority (and to effectively re-inforce Mr Berlusconi's leadership). However in the short run Mr

¹³ Constitutional Law 3/2001, together with Const. Law 1/1999, is by far and large the major revision of the Italian Constitution since 1948; it has suppressed no less than five articles of the Constitution and it has entirely re-written fourteen of them strengthening the role of the Regions which in Italy share with the National Parliament legislative powers (the new art. 117 lists the areas in which Parliament may pass laws, while in many other areas Parliament may pass only directives to be implemented by each regional Assembly; all unmentioned areas fall now within the sole regional legislative powers). The revision of title V of part II of the Italian Constitution is being implemented step by step, and the finally outcome of the process is still to be evaluated.

Bossi was nominated by Berlusconi as member of his cabinet in charge with constitutional amendments in general and specifically in charge with the process of devolution.

Already not unanimous on these matters¹⁴, the Cabinet and the majority coalition spent nearly a couple of years to find its way out from this basic dilemma: start all over again cancelling the center-left strategy concerning State-Regions relations or implement and possibly enhance and correct that same strategy? In fact while some of the cabinet members were submitting proposals to implement the 1999 and 2001 reforms (Mr La Loggia, Mr Pisanu), other were submitting new constitutional proposals to grant the Regions *sole* legislative powers in very sensitive areas such as health care and hospitals, education, local police (Mr Bossi). By the end of the year 2003 the lines of a feasible compromise had been finally traced (not without a lot of armtwisting and several outbursts of bitter intergovernmental and intercoalitional controversies): the cabinet and its coalition would go ahead with the new rules meant to implement the previous constitutional changes and at the same time a major constitutional proposal would be introduced in order to tune up Italy's form of government, to reform the odd Italian bicameral Parliament, inclusive also of Mr Bossi's proposals meant to strengthen regional law making powers. At the same time in order to win the confidence of both AN and UDC the notion and the means to protect the "national interest" would be re-introduced in order to ensure that centrifugal tendencies could never undermine the unity of the nation. A marked inclination toward schizophrenia by the center-right coalition has been confirmed by the day by day decisions concerning the interpretation of the 2001 reform and the implementation of it by the single Regions: the Berlusconi cabinet has consistently opposed any even mildly pro-regional choice made at any level and has not laid down the rules according to which the new state-regions tax relations should be based (see art. 119 *It. Constitution*). By doing this it has severely hampered the real chance for the regions to act in a truly autonomous way¹⁵.

Speaking about the form of government I used the term "tune up" because the outcome of the 2001 parliamentary elections and the way the candidacies had been submitted by both coalitions had signalled that the Italian political and institutional system should definitely be regarded as majoritarian: in fact, although voters elected two parliamentary assemblies, they did not only determine a clear center-right majority, but casting their vote they gave a no less clear mandate to a specific governmental leader. The

¹⁴ Mr Berlusconi's coalition includes his own party (Forza Italia - FI), the National Alliance – AN (led by Mr Fini now minister of Foreign Affairs), the center catholic party Unione democratica del centro – UDC (led by the other vicepremier Mr Follini) and the Northern League – NL (led by Mr Umberto Bossi who had to resign after suffering a stroke in the first part of 2004). Both AN and UDC share a strong tradition in favour of the central authorities in face of the Regions and feel the urge to give thier voters assurances that the unity of Italy will never be put at stake; to the contrary the NL in its drive toward the largest autonomy of the Regions has often chosen in the past to foster the "independence from Rome" of some of the Regions of the Northern part of the country (an issue which has never truly been in anyone's agenda but useful to win the votes of those Northern Italians unsatisfied with the inefficiencies and the wastes of the central and Southern authorities).

¹⁵ The major constitutional revision described in the next paragraph also includes a provision according to which no tax decision by a single region however legitimate would be legal if it would turn into a contribution to the rise of the total tax pressure: which is like saying, in other words, that the regions might be financially autonomous only when, if and to the limited extent that the central state decides (which might prove to amount to little more than zero, in a country like Italy with a gigantic debt, still larger than the GNP of a year).

symbols printed on the ballots on behalf of *both* coalitions had been unmistakably centered around the names of the two candidates for the premiership, Mr Berlusconi and his opponent Mr Rutelli. No one could share a doubt that either one would have led the nation according to the popular will (apart the case of stalemate between the two coalitions): as a consequence the role of the President of the Republic in the choosing of the president of the council was bound to be much more limited than it had previously been customary in Italian politics when he had to play broker of uncertain post-electoral coalition deals among parties¹⁶.

5. The latest and most comprehensive attempt to review Part Two of the Constitution in order to close the season of institutional and political innovation¹⁷.

The proposed revision of Part II of the *Italian Constitution* (only Part II, because neither the Fundamental Principles or Part I – Rights and Duties of Citizens are to be amended), has been passed by the Italian Senate in March 2004 and by the Chamber in October 2004 with major changes. This means that for the time being¹⁸ only one of the four readings has been completed. If the Senate will amend the text adopted by the Chamber (which is likely to be the case) the procedure will start over again, because according to the *Italian Constitution* (art. 70) all laws must be adopted in the same text by both Chambers (this is exactly one of the features of the *Italian Constitution* that the project would try to change). Therefore it must be emphasized that the outcome of the reform is rather uncertain both in relation to its content and to the if and when of it¹⁹.

During the first two parliamentary readings (Senate, Chamber) the text submitted by the Berlusconi Government has been amended and also enlarged in order to cope with matters not tackled by its original draft. In fact, the first draft proposed amendments concerning 28 articles of Part II *Italian Constitution*; the one shortly described here concerns 43 articles of Part II (which includes 80 articles altogether, 20 of which have been already amended in 1999 and 2001).

The proposed revision of Part II *It. Const.* must be evaluated within the frame of (a) the post World War II Italian constitutional history and especially (b) within the frame of the most recent previous revisions (*constitutional Acts of 1999 and 2001*). The *Italian Constitution* of 1948 has been

¹⁶ It must be emphasized that the Italian experience has clearly demonstrated how different it is to form a government when coalitions have been agreed upon before the elections and submitted to the voters and when they have not.

¹⁷ The project we are describing has been submitted by the Berlusconi Cabinet on Oct. 17, 2003 (AS 2544); it was passed by the Senate on March 25, 2004; and then passed by the Chamber (AC 4862) on Oct. 15, 2004; it was re-introduced in the Senate on Oct. 17, 2004 (AS 2544-B) where the examination of the text is slowly moving ahead.. Article 138 *It. Const* provides that any constitutional amendment must be adopted by both Houses of the Italian Parliament (the Chamber of Deputies and the Senate of the Republic) twice with an interval between the votes of not less than three months. An absolute majority is required. Thereafter the act introducing a constitutional amendment can be submitted to a referendum if a request is made by (i) one fifth of the members of either Chamber or (ii) by 500.000 citizens or (iii) five Regional assemblies. The law shall enter into force only if approved by the majority of votes.

¹⁸ These notes are updated to February 2005 when the second Senate reading is under way.

¹⁹ The Fourteenth Parliament should last until the Spring or early Summer of 2006: therefore little more than one year is left to pass the constitutional revision we are talking about. If a project submitted during the course of a parliamentary term is not passed before the term expires, the entire procedure must start from scratch irrespective of which coalition wins the elections.

amended 13 times up to now; but only 4 amendments have been adopted from 1948 through 1990, and 9 thereafter (1991-2003). It is well known that the Italian political institutions have gone through major changes in the early Nineties (so-called *transition*). Furthermore complete revisions of the Constitution have been officially attempted by summoning no less than three *ad hoc* parliamentary committees (in 1983-1985, 1992-1994 and 1997-1998), with no immediate outcome. As we have already noted, several of the proposals submitted by the last of these special committees (the D'Alema Commission) have been adopted afterwards. In particular Title V of Part II (through the mentioned constitutional acts of 1999 and 2001) has been thoroughly amended strongly enhancing the powers of the Regional Governments, but also leaving some untackled issues and some new problems in the process²⁰.

The center-left decision to pass the 2001 reform against the opposition, explains why Mr Berlusconi and his allies have felt free to introduce a second major *not bipartisan* revision of Part II of the Constitution and to do it through a text initiated by the Cabinet and not by the parliamentary groups.

In general, the project is meant (a) to complete the political and institutional transition which has begun in the Nineties through the electoral reforms of 1993, 1995 and 1999; (b) to get rid of the present bicameral Parliament regarded as outdated and unefficient by most scholars (the two Chambers basically share the same composition and powers); (c) to tackle some of the flaws of the 2001 revision and other problems left unsolved by it. This having been said, here is a summary of the major changes that the Act adopted by the Chamber of Deputies in October 2004 would bring about if it would ever enter into force:

- a) a *new Parliament*; there would be a *Chamber of Deputies* composed by 518 instead of 630 members + 3 lifetime deputies designated by the President of the Republic (for the time being they are five); a so-called *Federal Senate* composed by 252 instead of 315 members, elected by the people of each Region the same day each Region elects its Regional Assembly and President (in the hope to foster territorial and political continuity between the senators elected within each Region and the regional political leadership); furthermore, 40 representatives of the regional institutions would take part to the Federal Senate activities (although with no voting powers);
- b) the *Chamber* only would have the power to pass a *no-confidence vote* against the Government and consequently only the *Chamber* could be dissolved; the *Federal Senate* would not be a chamber ordinarily run by majority rule and it could never be dissolved;
- c) legislative powers would be shared by the two Chambers in the way as follows: (i) all Acts on State exclusive matters (that is to say matters in the sole law making competence of the national Parliament, as laid down by art. 117.2 *Const.*) would be assigned to the *Chamber* (with the *Senate* sharing a limited power to submit amendments); (ii) all Acts on State-Regions

²⁰ It must be reminded that the 2001 revision of the Constitution - for the first time in the Italian constitutional history - has been passed by a slight majority of 4 votes in the Chamber, a major breach in Italian previously bipartisan approach to constitutional matters.

- concurring matters (that is to say matters on which the national Parliament has a law making power limited to general principles while each region has the power to implement those principles passing its own legislation, as laid down by art. 117.3 *Const.*²¹) would be assigned to the *Federal Senate* (with the *Chamber* sharing limited amendment power); (iii) a set of specific matters would remain bi-cameral. All this means that *only* the matters put under the prevailing law making power of the *Chamber* would be decided on the base of majority rule;
- d) however the Cabinet would be entitled the power to obtain that an Act in the material area assigned to the prevailing competence of the *Federal Senate* might be turned to the *Chamber* for the (consequently majoritarian) final decision; the *President of the Republic* would have to overlook this procedure and to grant that the pre-conditions laid down by the Constitution would be met;
 - e) the President of the Council of ministers (as it is called now²²) would be entitled a rather stronger role and would become a true *Prime minister*: he/she would be nearly directly elected (the President of the Republic would be legally bound to nominate Prime minister the leader of the majority coalition which would have won the elections, possibly with the name of the candidate Prime minister already printed on the ballot), he/she would have to submit his/her program to the sole *Chamber*; he/she would have the power to nominate and dismiss all the ministers (power which the present Italian President of the Council does not hold); he/she could only be forced to resign if and when its own majority so would ask by passing a sort of *konstruktives Misstrauensvotum*; he/she could ask the President of the Republic to dissolve the Chamber (as long as his/her majority agrees and doesn't substitute him/her);
 - f) both the Government and the opposition's powers in Parliament would be strengthened;
 - g) the President of the Republic would basically keep the same powers he has now but he/she would be more clearly limited in the exercise of its more political powers (the designation of the President of the Council and the dissolution of Parliament: in exercising these powers the President would have much less leverage than he has had until today);
 - h) title V of the Constitution as revised by the Center-left reform of 2001 would be amended again in several points. Mainly: (i) several concurring or shared matters would re-centralized, while (ii) some other (health, education in part, regional administrative police) would be devolved to the sole competence of the Regions²³; on the other side (iii) under specific

²¹ The reader should note that the Italian concurring legislation is different than the German *konkurrierende Gesetzgebung*: in the German case, it is up to the central authorities to determine the matters on which to exercise its law making competence; in the Italian case it is by constitution a *shared* competence on the *same* matters with the consequent hardly avoidable arm-twisting between State and Regions on interpretation of the constitutional provisions (until the Constitutional Court is called to find a feasible way out).

²² The words "presidente del consiglio" (president of the council [of ministers]) mean that according to the Italian constitutional tradition and to the 1948 *Constitution* the person who chairs the meetings of the Council of ministers has no hierarchical prominence over the other ministers, members of the Council as well.

²³ This is all what survives of the "devolution" flaunted as such a great achievement by Mr Bossi and its Northern League! Something which is hard to explain to foreign friends is that these few added competences still seem enough for the center-left opposition to claim the unity of the country is at stake.

conditions the central authorities (*Parliament* under proposal by the Cabinet) would be entitled the power to overrule and cancel all regional laws regarded as in contrast to the *national interest*²⁴;

- i) local bodies (*municipalities* and *provinces*) would be entitled direct access to the *Constitutional court* against both Regional and State laws assumedly in breach of their constitutional right to autonomy;
- j) the *Constitutional Court* (which is now composed of 5 members designated by the President, 5 elected by both administrative and ordinary magistrates, 5 elected by the Parliament) would still be composed by 15 members, but only 4 selected by the President (one less), 4 elected by the magistrates (one less), 3 elected by the *Chamber* and 4 by the *Federal Senate* (two more by Parliament) with a slight shift toward more politically oriented choices²⁵;
- k) finally, according to the revised art. 138 which regulates constitutional amendments, a popular referendum could *always* be requested when the Parliament revises the Constitution (while presently if a constitutional act is passed by a 2/3 majority in each Chamber no referendum is allowed²⁶).

6. A short evaluation of the project

The opposition has already announced that in case this Act is passed, it will request the popular referendum and that of course it will determinedly campaign against its approval. Academics also have mostly been critical of the project although from rather different point of views: many fearing an excessive strengthening of the new figure of the Prime Minister and a potential loss of influence by the two Chambers on one side and of the President of the Republic on the other, others - quite to the opposite - fearing that the new role of the Federal Senate would make it difficult for the Cabinet to fulfill its program, others believing that the law making process would prove to muddled and subject to armtwisting and controversy between the two Chambers, others criticizing how timidly the Senate would be reformed, nearly all pinpointing an entire set of mostly minor technical flaws which would affect the new text of the Constitution.

My opinion is that although there undoubtedly are issues which would not be solved in a persuasive way, the harshest criticism to the project is basically prompted by political bias. By no means the new part II of the Constitution would reduce the democratic guarantees and it would only provide for a

²⁴This provision means that the constitutional notion of *national interest* ("interesse nazionale") canceled by the 2001 reform would triumphantly be re-introduced within the text of the Constitution (by a majority and a Cabinet in which the Northern League has such a relevant role!).

²⁵A slight shift because for the time being it can be assumed that politically oriented choices affect 10 out of 15 members (the five selected by the President and the five elected by the two Chambers together); tomorrow they would become 11 instead of 10 (the 4 selected by the President, the 3 elected by the Chamber and the 4 elected by the Federal Senate).

²⁶This provision obviously enhances any proposal assumedly supported by the voters and weakens any less popular proposal (and it can be regarded according to the different opinions as a more *populist* or a more *democratic* approach toward constitutional change).

limited strengthening of the executive which in Italy has been extraordinarily weak if compared to those of countries like Germany or Spain or the United Kingdom (for instance the Italian President of the Council doesn't share some of the main powers of the German Chancellor: no power to determine the so-called *Richtlinien* of his/her Cabinet, no power to dismiss and change ministers, no power to determine or at least substantially influence the dissolution of Parliament). In fact the part of the reform concerning prime ministerial powers and Cabinet-Parliament relations although by far and large too detailed would basically rationalize and consolidate an evolution of the Italian form of government which has already occurred. To that it would add some more effective tools for the Prime Minister to keep its coalition close together and united: if one takes into consideration the long term traditions and customs of the extremely fragmented Italian party system this should hardly be regarded as a negative development²⁷. Some critics fear that the role of the President of the Republic would be reduced: this is true only in a limited way. First of all because some of the envisaged amendments in this direction have already been canceled (and I personally question whether it has been a wise choice), and second because a less politically influential role of the President is just the other face of a better functioning democracy, just as a particularly influential role has been in the past the other face of a party system often unable to deliver the minimal performances needed by parliamentarism. To put it in clear wording: no head of State of well functioning parliamentary democracies has much to say about the coalition which is supposed to support the government, about the selection of the man who is going to run the Cabinet and about the selection of its members; in Italy these have often been (also) the President's business for the simple reason that the political parties would not be able to strike a deal before or immediately after the elections, neither would be able to remain faithful to it for more than a few weeks. One should rejoice when and if the Italian political system will not need the President, symbol of national unity, to replace the parties in the performance of their duties: this explains why I welcome any development in this direction and any constitutional amendment which might re-inforce and make more stable a similar trend.

On the other side the announced changes to title V, tuning up the 2001 revision without subverting it at all, would mostly come for the best²⁸.

The true major potential flaw of the project concerns the *Federal Senate* that is to say how the issue of bicameralism would be addressed. First of all (a) it could turn out to be another assembly in which party allegiance might prevail over the Regional interests which should rather be represented within it

²⁷ Oddly enough many still criticize the 1993 electoral laws for the high degree of fragmentation of the Italian political system: there is no doubt that the Italian party system is very fragmented and there also is no doubt that the Italian electoral, campaign and public financing laws enhance this fragmentation. However, the Italian political system always was very fragmented; if the 1993 laws have not been able to cope with this reality it has not occurred by chance but it has been the deliberate outcome of rational choices by the very same actors of the existing party system, who have never had any intention to really curb the historic tendency toward fragmentation. Therefore it doesn't make sense to claim that the electoral laws should be changed *instead* of adapting the Constitution to the needs of a highly fragmented party system: those who really want to significantly reduce fragmentation and are willing to pay some political price in order to pursue such a goal must still be born!

²⁸ In fact this has been admitted by several senators of the opposition, who have declared that if the text would have been limited to the part concerning State-Regions relations they could have taken into consideration voting in favor.

and by it; (b) its legislative powers could prove to be *too* extensive and hamper the ability of the Government to implement its program (as a highly esteemed colleague and great expert in these matters has noticed from the very beginning, professor Augusto Barbera); (c) the law making process might prove to be too complicated²⁹.

It must also be added that the implementation of the reform could take as long as 7-8 more years according to the calendar laid down by the act itself with an extraordinarily long transitional period bound to introduce a degree of uncertainty in the running of the main Italian institutions.

7. General remarks on constitutional change in Italy

I already mentioned my opinion according to which the harshest criticism against the center-right coalition attempt to revise the Constitution and the decision of the opposition not to cooperate in this effort are determined by political bias. To note that, however, does not mean that I regard as *ungrounded* this political bias. Quite to the contrary I understand its reasons and I regard it as largely justified.

First of all the Italian experience tells that there is a great difference between amending an existing and relatively well consolidated Constitution and writing down a Constitution for the first time (as it was the case in Italy 60 years ago and as it has been the case in South Africa or in Afghanistan and in other countries in recent years). As long as one does not meddle with the fundamental principles and values upon which the constitutional arrangements are based, the assumption that a Constitution can only be changed on a bipartisan base often leads nowhere. At least this is what has happened in Italy. Therefore I wellcomed the center-left coalition's decision to pass the 2001 reform even if the center-right had asked not to. In the very same way I evaluate the center-right attempt to revise part. II of the Constitution now. Therefore I understand that the present opposition while approaching important regional (2005) and then general (2006) elections legitimately doesn't want to limit its role to slightly influence an institutional strategy which is not its own, neither does want to help its opponents to obtain a major political success.

Second, and most important, if one sets the pure content of the reform aside, there is little doubt that the record of the present governing coalition in Italy and especially of its leader Mr Berlusconi is rather questionable. One doesn't need to approve the often exaggerated and frankly obsessive criticism against Italy's controversial President of the Council, in order to admit that their behaviour and their specific choice in many many areas are hard to accept and to share. I won't discuss here four years of center-right policies in Italy. I will only mention some of those which can more directly affect the functioning of the political institutions of the country: namely the attitude and the proposals of the center-right majority toward the judiciary and both the civil and criminal law and procedures on one side, and the choices made in the area of media regulation and the so-called conflict of interests determined

²⁹ As the prevailing law making power would belong to either Chamber according to the material object concerned, it can be understood that it might prove difficult and in all instances controversial whether the content of a submitted bill could and should be entirely classified among the solely central matters or the shared matters (not to mention the case of amendments introduced during one of the parliamentary readings which could determine a switch in the prevailing competence...).

by the personal position of Mr Berlusconi as Italy's richest entrepreneur and the owner of Italy's main private tv and advertising company, in control of nearly 40% of the market. In both these delicate areas the record of Mr Berlusconi and his team has been rather unsatisfactory. The Italian judiciary is still very (and sufficiently) independent; the Italian media system is still very (and sufficiently) pluralistic: but in neither area the situation is better than it used to be, in neither area the future appears without some worry, while the conflict of interests has been finally tackled after an intolerable delay in a way which many still regard as inadequate³⁰.

What makes the Italian situation harder to evaluate than one might believe and suggests some cautiousness in passing judgements is the history and the sequence of developments which have brought to the present situation, and which basically explain what it might otherwise appear difficult to explain: how come one of the most developed nations in the Western world twice in less than a decade has freely decided to choose as its political and executive leader such an unexperienced, apparently naïf blunderer, often embarrassing in his political incorrectness and in his tendency to manage the country in a clumsy and unprofessional way while at the same time openly and outspokenly promoting his own company's if not his own personal well-being.

At this point I'll just recall (a) the degree of de-legitimation of the political parties which had run Italy until the early Nineties without the slightest willingness to see anything but the strictest party interests; (b) the un-controlled growth in legal instruments (including the capacity to severely limit individual freedom from easy and un-motivated arrests) and consequently in political influence not of the judiciary as a whole but of that part of the judiciary which is in charge with public prosecution³¹; (c) the long and painful history of the broadcasting system in Italy with the decennial refusal of the main political parties of the time to privatize the State networks and/or to allow new private companies to compete with them on a fair base (the one and only reason why in the end a duopoly was settled: the three public networks on one side, the three Mediaset - Berlusconi's main company - networks on the other³²).

³⁰ Although it should be admitted that practically nowhere more stringent laws exist: the point is that practically nowhere (if we stick to advanced and consolidated democracies) a case like Mr Berlusconi's in Italy has occurred. In fact it is not easy to envisage rules strong enough to cope with a similar case and at the same time constitutionally legitimate (after all the constitution of a liberal-democracy can only limit private property up to a certain point: and the Italian Constitution basically would not as long as it is not amended: a step which can hardly be expected by the present center-right coalition!).

³¹ It should never be forgotten that in Italy public prosecutors – amounting to about 1200 magistrates – are just as independent as judges are entitled to be. No hierarchy, very limited responsibility, rather effective powers as they can have people arrested, a single common career with those magistrates who are judges including the possibility to act as judges for a few years and as prosecutors for more years in the same territory, and so on: in a way that has made out of them not only often very respected officials but also extremely powerful and influential and feared authorities having a distinct edge over both judges and defendants. This explains the ground for the bipartisan revision of art. 111 *It. Const.* mentioned before and meant to foster fair trials.

³² Nowadays and for the last ten years the two opposing networks have been able to drag a share of near 85% of the market, leaving very little space left to other competitors. The situation has become more worrying after Berlusconi became chief of the government: as such he was entitled with some influence on the State networks while already being the owner of the other main competitor. If the broadcasting system would have been truly opened to competition and privatized when the time had come in the late Seventies, no duopoly would have been born and may be Mr Berlusconi would not have been able to build such an influential and large media company, or at least he would have had to face a

To all this I would like to add that in several instances specific measures passed by law by the center-right majority have been declared unconstitutional and invalidated by the Constitutional Court while others are still under scrutiny³³: this instance seems to demonstrate that the present system of checks and balances is basically working in an effective way.

Altogether it cannot come as a surprise that in a young majoritarian political system in which both sides still tend not only to bitterly compete one against the other to win popular approval but at the same time tend to undermine each other's legitimacy, a deep cleavage has been digged which divides those who are in favour and those who are against the present attempt to reform part II of the Constitution. If one sticks closely to the content of the project one should be able to agree that it constitutes a good effort to bring an end to the Italian transition opened over ten years ago; if one believes that the general context counts more than the specific content of the project because anything that comes from the coalition presently in power led by Mr Berlusconi cannot be trusted by definition no other conclusion can be drawn than that no effort should be spared to stop it and wait for better times (and of course another coalition in power).

The risk could be that another delay might offer more chances to those who – in the very end – believe Italy was better off *before* the transition got under way and when the old Christian Democratic ruling class was softly running business in the country often taking decisions along with the Communist party which had the monopoly of the constitutional opposition: crime was as bad as nowadays, unefficiencies no less, corruption possibly worse, political responsibility nonexistent, voters power very limited, but everything seemed to work more smoothly, reciprocal tolerance pushed to the point of complicity higher, decision making power shared among a plurality of actors: altogether a nice and effective guarantee of conservatism. At the time many of us didn't use to regard the Italian as an "ordinary democracy" ("una democrazia normale"): it seemed to work in a rather different way compared to the way most Western democracies we knew were and are run, and we thought we should change this arrangement, the sooner the better. Now we have started experiencing a new way of dealing with our political issues, the actors are still practicing and the act they put up is often rather poorly interpreted, so we often have to endure unpleasant side effects: so much so that a lot of those who staunchly campaigned as reformers in the early Nineties have changed their mind. I must confess that I haven't; I haven't forgotten the way public institutions were run up to the day before yesterday, neither all the good reasons to reform that system. My personal belief is that we should try to be consistent and move forward in the same direction before deciding is time to give up and before concluding that Italy's destiny is to be a non competitive and consensual democracy. And this in the end is the true reason why I would prefer to run the risk of an imperfect constitutional revision rather the risk of constitutional paralysis: but I understand the reasons of those who prefer the contrary and respect them sincerely.

much more competitive market where to prove his capacities.

³³ I can mention the law according to which the top institutional authorities could not have been prosecuted as long as in charge of their high offices (at the time this provision was probably meant to protect Mr Berlusconi himself) or the law which has greatly reduced the sanctions against white collars' crimes as false statements in account; not to list numerous decisions concerning less sensitive areas (immigration policy, State-Region relations and so on).

8. Some hints specifically regarding the Italy/Japan comparison

The Italian political and constitutional events during the last 15 years bear some evident resemblances to what has occurred in other countries and in Japan in particular. In fact there is something really amazing in the fact that both countries have undergone a major institutional crisis about 45 years after the war they infamously fought together on the wrong side, so to say (for values which none of us both in Italy and in Japan – and in Germany of course – would ever share). There are other similarities which have been already stressed several times starting from our first Seminar in Florence, three years ago: two defeated nations, two economies which have recovered in a relatively short time and in a spectacular measure, two countries deeply influenced by their strategic role and by their position within the frame of the East-West confrontation, two political systems both based on the hegemony of a single party able to stay in power for over 40 years, two leading parties (LDP and DC) both featuring a very high level of internal factionism... and so on up to the attempt to reform the system recurring to new electoral laws.

Here I would like to shortly summarize and list some relevant differences between the Italian and the Japanese case: (a) the constitutional framework is somewhat different; for instance in Italy we have a President of the Republic whose constitutional standing has never been clearly defined so that some Presidents have been able to play a significant role within the transition; (b) in Italy the Constitutional Court is not appointed by the Cabinet alone (actually strictly speaking the Cabinet has no direct role in the nomination of the members of the Court); (c) Italy's Constitution provides for various forms of direct democracy basically unknown to the Japanese system; (d) although in neither country the pre-transition political ruling class has been wiped out, the Italian party system has undergone much more relevant changes than the Japanese one where the LDP still is the leading force and it is still divided in factions; (e) the Italian political system had to face more and more relevant external pressures than the Japanese one (the European Union, the fall of the Soviet Union, a particularly independent and active body of public prosecutors); (f) the changes in the Italian electoral laws seem to have favoured a bi-polar confrontation between opposing coalitions more than it has occurred in Japan and up to the point that in Italy inner party factions have been nearly suppressed; (g) although Mr Koizumi has been often resembled to Mr Berlusconi (in fact they share a similar dose of personal flair), the former is a much more subtle politician than the latter, appears rather more respectful of party traditions, actually has to daily deal with a political party and its lively factions so more than Berlusconi (who has to deal mostly with the leader of allied parties other than his own); (h) Mr Berlusconi's effective capacity to influence the media is probably higher than Mr Koizumi's and in general the Italian can count on a broader range of personal resources. It can probably be said that the two men are the Italian and Japanese interpretation of a more general trend which is the personalization of the political conflict within our contemporary democracies, having in common a center-right siding and a tendency toward a populist interpretation of politics.

9. Final words

One thing which I believe we can all agree upon is that both the Japanese and Italian case are a convincing demonstration of the relevance and the long lasting impact of what can be called *political culture*. Both cases and certainly the Italian one prove at the same time the merits and the limits of formal legal structures as instruments to efficiently regulate political behaviour. New constitutional rules, new ordinary laws, new electoral systems do produce change, do stimulate expected conducts but only up to a certain point, beyond which only a consistent and long effort might produce steady and consolidate change. A political culture is always grounded on history, on traditions, on long range societal features: it has a lot to do with the intimate structure of a community. One could even say it has to do with cultural anthropology more than anything else that is to say with very resilient aspects of a people's nature. It's very hard stuff to cope with: constitutional lawyers as well as political scientists interested in improving the functioning of their political systems should better be well aware of that.

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